

No. 10149

In the United States
Circuit Court of Appeals
For the Ninth Circuit

STANLEY LABORATORIES, INC., and
EDWARD A. BACHMAN, an individual
trading as STANLEY LABORATORIES and
as STILLMAN PRODUCTS COMPANY,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Review

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FILED

MAY 10 1943

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PETITION FOR REVIEW

STATEMENT OF THE CASE

This is an original proceeding to review findings as to the facts and conclusions and order to cease and desist issued by the Federal Trade Commission against your petitioners Stanley Laboratories, Inc., and Edward A. Bachman, an individual trading as Stanley Laboratories and as Stillman Products Company. Among other things the Order prohibits your petitioners from using

the letters "MD" on any product of petitioners which has not been endorsed or recommended by the medical profession. The Order prohibits also the use of the picturization of a doctor, or a nurse, or a cross on any product of petitioners which has not been endorsed or recommended by the medical profession.

STATEMENT OF FACTS SHOWING JURISDICTION IN THIS COURT

This Court has jurisdiction to review the findings of the Commission and the Order to Cease and Desist under an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes," and amendments thereto (U.S.C.A., Title 15, Par. 45) and also by reason of the fact that the acts complained of in the complaint of the Commission are alleged to have been committed within the Ninth Circuit. The petitioner Stanley Laboratories, Inc., is a corporation organized under the laws of Oregon with its principal place of business in Portland, Oregon; the petitioner, Edward A. Bachman, is an individual residing in Portland, Oregon.

The Order sought to be reviewed is dated the first day of April, 1942 (R. 30), and the petition to review was filed on the twenty-third day of May, 1942 (R. 340), within the sixty-day period allowed by law.

THE COMPLAINT

The complaint in this case is entitled "In the Matter of Stanley Laboratories, Inc., a corporation, and Edward A. Bachman, an individual trading as Stillman Products Company and as Stanley Laboratories," Docket No. 4130, before the Federal Trade Commission, and was issued on the seventh day of May, 1940.

To summarize briefly, the complaint alleges that Stanley Laboratories, Inc., and Edward A. Bachman, an individual, trading as the Stillman Products Company and as Stanley Laboratories are engaged in business, with their principal place of business in Portland, Oregon; that your petitioners sold and transported in interstate commerce certain drug products for feminine hygiene, including MD Medicated Douche Powder; that petitioners in the course of their said business disseminated false advertisements concerning their products; that petitioners by use of the letters "MD" on the products known as MD Medicated Douche Powder represented to the public that said product was either prescribed or compounded, or endorsed, or recommended by the medical profession; that said false advertisements cause a portion of the purchasing public to purchase said drug products and that said acts and practices are to the prejudice and injury of the public and constitute

unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

THE ANSWER

The answer states that petitioners are engaged in business as alleged in the complaint; that petitioners had long since discontinued the sale of all of said products in interstate commerce except the MD Powder; that they had discontinued the practices complained of long prior to the filing of the complaint and specifically had discontinued the same in accordance with the stipulation filed with the Commission on January 31, 1940; that they had published certain advertisements in connection with the sale of said products; that the use of the letters MD on the product MD Medicated Douche Powder was not intended to deceive or mislead and did not in fact deceive or mislead the public or possible purchasers of said product into the belief that MD Powder was endorsed or recommended by the medical profession as such; that MD Powder was in fact prescribed and used under the prescription of licensed physicians who are members of the medical profession; that petitioners have long since discontinued the use of the word "laboratories" both in advertising and in their corporate name; that your petitioners deny emphatically that the use of the letters MD has ever prejudiced or deceived

the public, or constituted unfair or deceptive acts or practices in interstate commerce within the meaning and intent of the Federal Trade Commission Act.

SUMMARY OF COMMISSION FINDINGS AND ORDER TO CEASE AND DESIST

On the first day of April, 1942, the Commission issued its Findings of Fact, Conclusions, and Order to Cease and Desist. The Commission found that there was not sufficient evidence in the record to warrant a finding involving any of the products of your petitioners except MD Medicated Douche Powder. The Commission found that your petitioners had published false advertisements concerning said MD Powder; that MD Powder has little or no therapeutic value; that the testimony of a bacteriologist with respect to the antiseptic and germicidal qualities of MD Powder was rejected with respect to its germicidal qualities on the grounds that the tests made in the laboratory were not similar to the use of the powder outside of the laboratory, and that hence the therapeutic value of MD Powder is limited to that of a mild antiseptic; that the use of the letters MD and/or the use of a cross and/or the use of the picturization of a doctor or a nurse has a tendency and capacity to cause members of the purchasing public to believe that said MD Powder is endorsed and recommended by the medical profession, and that the use of

the cross has a tendency and capacity to cause members of the purchasing public to believe that MD Powder is in some way endorsed or approved by the American Red Cross; that the use of the letters MD on said MD Powder, and the use of false advertisements does in fact mislead and deceive a substantial portion of the purchasing public to believe that said advertisements are true. The Commission concludes that the acts and practices alleged and found to exist are to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the meaning and intent of the Federal Trade Commission Act.

Under the terms of the Order of the Commission, your petitioners are required to cease and desist from alleging that MD Powder is dependable, or an effective, or reliable antiseptic powder, or other words of similar meaning; to cease and desist from using the letters MD in the trade name of MD Medicated Douche Powder or any other preparation which has not been endorsed or recommended by the medical profession; to cease and desist from using the picturization of a cross, a doctor, or a nurse on said MD Powder; and finally petitioners are required to file with the Commission within 60 days a report in writing setting forth in detail the manner and form in which they have complied with said Order.

ASSIGNMENT OF ERRORS

The respondent Federal Trade Commission erred:

1. In finding that MD Medicated Douche Powder is not a germicide but merely a mild antiseptic and may not be described as dependable or as an effective, reliable germicide and antiseptic powder.

2. In finding that MD Medicated Douche Powder has little or no therapeutic value.

3. In finding that the undisputed testimony of the bacteriologist was invalid in which he showed that under laboratory tests MD Medicated Douche Powder is a germicide.

4. In finding that in using the letters MD as part of the trade name of MD Medicated Douche Powder petitioners made false representations to the public that said product was either prescribed or compounded by physicians, and/or that it was endorsed or recommended by the medical profession, and that by including therewith the likeness of nurses or doctors and the figure of a cross the product simulates the American Red Cross emblem; and in finding that MD Powder was not prescribed or compounded by physicians; and in finding that the use of the letters MD has the tendency and capacity to cause members of the purchasing public to believe that said product is endorsed and recommended

by the medical profession; and in finding that the use of a cross has the tendency and capacity to cause members of the purchasing public to believe that the product is endorsed or approved by the American Red Cross; and in finding that the picture of a nurse or doctor in advertising said product has a tendency and capacity likewise to cause members of the purchasing public to believe that the product is in some way endorsed or approved by the American Red Cross or by the medical profession.

5. In finding that the advertisement of MD Medicated Douche Powder has the tendency and capacity, and does in fact, mislead and deceive a substantial portion of the purchasing public to believe that said advertisements are true, when as a matter of fact they are not true.

6. In concluding that the acts and practices of petitioners are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

7. In ordering petitioners to cease and desist from the use of the letters MD in the trade name of petitioners, or in any other manner, either alone or in conjunction with the picturization of a doctor, nurse, or

cross to designate any preparation of petitioners which has not been endorsed or recommended by the medical profession.

8. In ordering petitioners to cease and desist from the use and picturization of a cross or any other alleged simulation of the American Red Cross emblem, either alone or in conjunction with the picturization of a doctor or a nurse to designate or describe preparations or products of petitioners.

9. In ordering petitioners to file with the Commission within 60 days of the Order a report in writing setting forth in detail the manner and form in which have complied with the Commission order.

SUMMARY OF ARGUMENT

The statement of points upon which petitioners rely may be summarized for purposes of argument as follows:

Point I

The findings of fact, conclusions of law, and the order to cease and desist, are not based upon substantial evidence, but are based upon a distorted construction of the testimony, much of which was wholly inadmissible, and incredible.

Point II

The stipulation filed by respondents on January 31, 1940, makes a cease and desist order improper and unnecessary in this case.

Point III

The motion of respondents to strike certain testimony should have been granted in full.

ARGUMENT

These proceedings were brought by the Commission under Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C.A., Pars. 45 and 52.

Point I

The findings of fact, conclusions of law and the order to cease and desist, are not based upon substantial evidence, but upon an unwarranted construction of the testimony, much of which was wholly inadmissible, and incredible.

While the findings of the Commission on facts are conclusive when supported by credible testimony, such testimony must be competent, substantial, and actually in the record.

In this case petitioners agree that Paragraphs One, Two, Three, Six and Eight of the Findings of Fact

are substantially correct, but petitioners contend that Paragraphs Four, Five, Seven and Nine of said Findings of Fact have no real basis in the testimony and should be set aside. Petitioners contend also that the Conclusions and Order of the Commission are erroneous and should be set aside, since they are based in part upon improper findings of fact.

Petitioners agree that the first sentence in Paragraph 4 of the Findings of Fact is substantially correct, but the rest of Paragraph 4 has no real basis in the testimony. *There is no proof whatever that MD Medicated Douche Powder was ever advertised as a preventative against conception, or as a prophylactic against disease generally.*

The testimony of Dr. M. E. Bachman, a brother of respondent, E. A. Bachman (R. 105-122), was based upon actual use by his patients and showed clearly that MD Powder is both antiseptic and germicidal and that it was safe and dependable as a douche. No witness testified from personal knowledge to the contrary. There is no testimony to show that the use of such words and phrases as "dependable," "insure," "reliable safeguard," etc., as stated in said Paragraph 4, has a tendency and capacity to make purchasers believe that the powder was a contraceptive or a prophylactic against disease. With many thousands of prospective purchasers

of MD Medicated Douche Powder in the United States, the Commission relies solely upon inadmissible testimony of doctors all of whom said they were not deceived but *thought* others *might* be deceived by MD Medicated Douche Powder advertising. None of these doctors qualified as an expert on *what other people thought* about MD Medicated Douche Powder. To formulate findings of fact based on such testimony is unsound and contrary to law. Expert testimony is made of firmer stuff. See 2 Wigmore, Evidence (3rd ed.), par. 661 et seq.; 7 Wigmore, Evidence (3rd ed.), par. 1962 et seq.; Westinghouse Electric & Mfg. Co. vs. Denver Tramway Co., 3 F. (2d) 285, 294; Farris vs. Interstate Circuit, Inc., 116 F. (2d) 409, 412; U. S. vs. Spaulding, 293 U. S. 498, 506.

We submit that the testimony of these experts on the reaction of the minds of the public, permits these experts to say in a Court of law what they think other people think. In other words, these experts are giving their opinion, not based upon any fact or credible evidence, but on their own conception of what other persons may believe. Naturally, these experts resent any intrusion upon their profession, and by their attitude they are frequently unable to give an unbiased and uncolored opinion. And to permit such experts to say what they

think other people think or believe is going beyond their prerogative as experts and should not be countenanced in a Court of law.

Paragraph Five of the Commission findings of fact should be set aside because of uncertainty, as well as for lack of proof in the testimony. The Commission finds that MD Medicated Douche Powder has little or no therapeutic value, and may or may not be a germicide. These statements show that the Commission did not find whether MD Medicated Douche Powder does or does not have therapeutic value, and the weasel-worded discussion in Paragraph Four as to whether the powder was a germicide or an antiseptic demonstrates the failure of the Commission to make a definite finding. There is no testimony by any Commission witness, based upon personal knowledge, on either point. There is at best merely some general opinion evidence given without actual experience or test of MD Medicated Douche Powder. It is axiomatic that the medical profession has considerable difference of opinion within its fold. Some of Commission's experts oppose the use of a douche (R. 257), while another sees no harm (R. 298).

Par. Seven of the Commission findings of fact have no real basis in the testimony. It is uncontradicted that MD Powder is a prescription prepared for E. A. Bachman, petitioner, by his brother Dr. M. E. Bachman of

Detroit, Michigan (R. 105-122). It is uncontradicted that Dr. Bachman (R. 105-122) prescribes it for his patients, as does Dr. Rienhart (R. 221-223). The Commission finding that the use of the letters "MD" either alone or in combination with the likeness of nurses, or doctors, or a cross, has a tendency and capacity to cause members of the purchasing public to believe that products so designated are endorsed or recommended by the medical profession, is based on testimony which is conjectural, inadmissible, incredible, and gives play to imagination.

All of the Commission doctors testified that they were not deceived by the use of the letters "MD" or by the use of the likeness of a nurse, or a doctor, or a cross, (R. 216, 251, 266, 300), but gave their opinion that other people were deceived, (R. 203, 267, 300, 305, 306). We submit that such clairvoyance should be rejected by a court of law as beyond the scope of the medical profession.

Dr. Albert Holman aptly expressed the attitude of all the doctors who testified that they were not deceived into thinking MD Medicated Douche Powder was endorsed by the medical profession when he said (R. 251):

"I know darned well it isn't."

Doctors are experts in their special fields of medical science, but their skill in the science of medicine *gives*

them no authority to reflect public reaction to newspaper or other advertising of MD Medicated Douche Powder.

Westinghouse Electric & Mfg. Co. v. Denver Tramway Co., 3 F. (2d) 285, 294.

Farris v. Interstate Circuit, Inc., 116 F. (2d) 409, 412.

U. S. v. Spaulding, 293 U. S. 498, 506.

In the Westinghouse case *supra*, the court rejected the so-called "expert" testimony of Dr. Wilcox on the plain ground he was not an expert on valuation, notwithstanding he had done considerable work in that field. In the case at bar the Commission offers the testimony of five doctors to the effect that the *public* (excluding doctors) is lead to believe that the letters "MD" on MD Medicated Douche Powder mean that the product is endorsed by the medical profession. None of these doctors attempted to qualify as an expert on the subject of what the public believes after reading the letters "MD" on MD Medicated Douche Powder, and it is submitted that it is patently unsound and contrary to the principles of law to predicate a finding, a conclusion, or an order on such testimony, most of which is founded on bias and prejudice.

In the Farris case, *supra*, the court said at page 412:

"Experts are entitled only to give in evidence their opinion as to conclusions of facts *within the range of their specialties*. . . . An expert is not per-

mitted to state his opinion on a matter of common knowledge; nor can he give his opinion as to conclusions from facts within his knowledge when that opinion answers the precise question for determination by the jury."

In the Farris case, *supra*, the appellate court rejected the testimony of two alleged experts on the grounds that they were not experts on the matters under inquiry. It would be difficult to conceive of a subject on which a medical doctor would be less qualified to speak as an expert than the subject of the mental reactions of the reading public.

In the Spaulding case, *supra*, Mr. Justice Stone points out at page 506 that the issue whether the respondent became totally and permanently disabled before his policy lapsed was the ultimate issue for the jury and that:

"The experts ought not to have been asked or allowed to state their conclusions on the whole case."

In this case, as in the Spaulding and other cases cited above, this court should reverse the Order of the Commission because the medical doctors who testified *were not experts* on the mental reactions of the public to the letters "MD" or MD Medicated Douche Powder, *and also because they stated conclusions on the very subject upon which the Commission was required to make a finding of fact.*

Five lay witnesses testified that Commission Exhibits 12 and 13 gave them the impression that doctors or the medical profession made or endorsed MD Powder. Cross examination of these witnesses disclosed that they had been visited by a Commission representative a year or more before the hearing, who showed them the letters "MD" on a toilet tissue advertisement and asked if those letters suggested that the product was endorsed by doctors or the medical profession. This method of laying the groundwork for similar testimony in the case at bar can hardly be approved in any court of law. It is unfair and inaccurate as a means of securing the reactions of the general public. Had witnesses been summoned from the streets, the shops, or the offices, and without previous conference or suggestion, been asked their reactions to Commission Exhibits 12 and 13, we might then have a bona fide and legal basis for a finding on the question whether the letters "MD" did in fact cause any member of the purchasing public to think that the product was made or endorsed by doctors or by the medical profession. In the present circumstances these petitioners respectfully take the position that the testimony of said lay witnesses for the Commission is unworthy of consideration or belief by a Court of law, particularly since none of them had ever bought douche powders in general or MD Medicated Douche Powder in particular.

A perusal of the testimony on cross examination of these lay witnesses for the Commission (R. 55-58, 61-65, 67-75, 91-94, 98-104) discloses: (1) That none of them had ever bought MD Medicated Powder or any other douche powder; (2) that none of them ever was deceived by the letters "MD," but that the letters gave the "impression" that doctors approved it; (3) that none of them had any idea why the letters "MD" gave such an impression except the letters made them think of a doctor. The testimony of the witness Paul Samuel Currin (R. 95-104) illustrates why respondents object to the use of similar testimony in this case. On cross examination (R. 98-104), Currin disclosed that about two years before the hearing he was visited by a Commission representative who showed him some toilet paper with the letters "MD" or something similar thereon and when asked by counsel what the representative asked him, replied:

"He asked me if I approved of it, and did I like it, and I said as far as I know, it was all right. I didn't know anything about it. I found it was—I remember looking at the thing, and I was talking to him, and he explained a little more about it. Then I said, 'I think you must have the wrong people', and then he explained to me about the situation." (R. 99.)

It is significant that the Commission offered not a single female witness to testify that she was a consumer of MD Powder and was deceived by the letters MD, or that she was not a consumer but had been deceived by the letters MD into thinking that the product was endorsed by the medical profession. This court may take judicial notice that women are sole users of douche powder, and are also the sole purchasers of the product MD powder. It is significant, also, that all of the women consumer witnesses who testified for the respondents, stated that they considered the letters MD merely a trade name (R. 226, 228, 229-231, 232-234, 309-310, 313) and that the letters "MD" did not give them the notion that the product was endorsed by the medical profession. The net result is that of all the potential consumers of MD powder, the Commission called none of them as witnesses, but relied upon the testimony of men who were neither users nor purchasers of douche powder and hence could never be deceived by the letters "MD" on such a product. Respondents submit that the uncontradicted testimony of the consumer witnesses offered by respondents, coupled with the failure of the Commission to offer testimony of any consumer witnesses, makes it apparent that the use of the letters "MD" on MD Medicated Douche Powder has not deceived nor do these letters have the capacity or tendency to deceive the public into believing that the product is endorsed by the medical profession.

The finding that the use of the figure of a cross has a tendency and capacity to cause members of the purchasing public to believe that MD Powder is in some way endorsed or approved by the American Red Cross is a fair sample of the unsoundness of the position of the Commission in this case. Entirely aside from the well-known fact that hundreds of other articles of merchandise are sold bearing a label which includes a cross similar to that used by the American Red Cross, this Court should take judicial notice of the historical background involving the cross as a symbol. The American Red Cross adopted the cross as a symbol in the year 1882. The same symbol has been used by others for centuries and the American Red Cross can have no monopoly in the use of that symbol when it is used on a commercial product. The red cross as a symbol was commonly used during the Middle Ages. It was a favorite in the Court of King Arthur. When Sir Galahad was about to set out on his famous journey, we are told that:

“Then a monk let him behind the alter, where the shield hung, as white as any snow, and with a blood red cross in the midst of it.” (King Arthur and the Knights of the Round Table, Grosse & Dunlap, p. 275.) See also pictorial frontispiece in this volume.

Paragraph 9 contains a finding that as a fact the use of alleged false advertisements has the capacity

and tendency to mislead and deceive the purchasing public and does in fact do so. The record contains no proof whatever that any person was ever deceived by any advertisement of MD Powder, but on the contrary is replete with proof that Commission witnesses and witnesses for petitioners alike were not deceived by any advertisement ever promulgated by petitioners. (R. 229, 232, 250-251, 286-287, 312-313.)

In the case of *F. T. C. vs. American Snuff Company*, 38 Fed. (2) 547, it is aptly stated:

“We can see no unfairness in the respondent using the word ‘Dental’ and the picture of a tooth on its packages.”

The Order to cease and desist is not supported by substantial evidence.

Petitioners have no objection to Pars. 1, 2, 3 and 6 of said Order, notwithstanding the fact that many of the provisions in those orders are unnecessary and not justified by the record. Petitioners insist most urgently, however, that there is no substantial or credible evidence in the record to warrant Par. 4 and Par. 5 of said Order.

The flimsy basis for Par. 4 of the Order is apparent from the language of the Order itself. The Commission says that petitioners may not use the letters “MD” on any preparation not endorsed or recommended by the

medical profession. The Commission knows from its own witness, Dr. David (R. 216, 217), that the medical profession does not directly endorse or recommend any product. The order, therefore, is based upon a condition impossible of fulfillment. Moreover, there is no proof that the use of the letters "MD" has ever deceived anybody into thinking that those letters meant endorsement by the medical profession. We contend that MD is a trade name meaning "Medicated Douche." The Commission testimony on this point has been outlined above, and may be summarized by saying that the doctors and the druggist testified emphatically that they were not deceived by the letters "MD" (while piously affirming that laymen were deceived, but without citing a single instance of such deception); and by saying that the lay witnesses who are alleged to be representative of the public were given the suggestion by a Commission representative. It is submitted that a fair reading of the testimony of these witnesses both on direct and cross-examination can lead only to the conclusion that the method of securing their testimony was so unfair as to make their statements worthless in the consideration of the issues in this case.

Paragraph 5 of the order to cease and desist has no basis in fact or in the testimony. It assumes that the emblem adopted by the Red Cross in 1882 is the sole

property of that organization, even if used on a commercial product, when in fact the emblem has been in common use for many centuries in connection with social objectives, and by commercial concerns for many years before the Commission was organized.

Further, there is no proof to show that anybody could be or has in fact been deceived by the use of the cross on MD Powder into thinking that it had any relation to the American Red Cross. This paragraph of the order represents an effort to cure an imaginary evil by depriving petitioners of a substantial right to employ a commonly used device to attract the eye of prospective purchasers, and to assist in remembering the product at a later date.

The provision in the same paragraph that the picturization of a doctor or nurse must not be used in connection with advertisements of MD Powder is equally unreasonable in that there is no proof that anybody was ever deceived by the use of such pictures, and in view of the common practice to attract the eye of the reader by such pictures.

Point II

The stipulation filed by petitioners on January 31, 1940, makes a cease and desist order improper and unnecessary in this case.

Petitioners rely on *John C. Winston Co. vs. F. T. C.*, 3 F. (2d) 961, cert. den. 269 U. S. 555, as an authority on all fours with this case with respect to the controlling facts and circumstances. Also the case of *L. B. Silver Co. vs. F. T. C.*, 292 Fed. 752. The general proposition that mere abandonment of a practice is not a defense to a complaint has no application to a case where the rule in the Winston case applies. In that case, as in the case at bar, the objectionable practice was discontinued on advice of counsel long before the complaint was filed; likewise in both cases a stipulation was actually filed showing that not only had the petitioners ceased and desisted from the objectionable practice but stipulated not to repeat such practices.

This case would probably never have come before the Commission except for the fact that petitioners declined to accept the dictum of the Commission that the use of the letters "MD" made the public believe that the product was endorsed by the medical profession.

Such cases as *Sears, Roebuck & Co. vs. F. T. C.*, 258 F. 307; *Guarantee Veterinary Co. vs. F. T. C.*, 285 F. 853, and numerous others of similar import are not in conflict with the Winston case, *supra*. In its brief in the Supreme Court of the United States in the Winston case, the Commission argued strenuously that the decision of the appellate court was inconsistent with the

Sears, Roebuck case and with the Guarantee case, *supra*, but the petition for certiorari filed by the Commission was denied.

Point III

The motion of petitioners to strike certain testimony should have been granted in full.

Petitioners' motion filed July 25, 1941, to strike certain testimony of Edward A. Bachman, F. R. Stipe, Drs. Norman A. David, Albert Holman, Thomas R. Montgomery, Frank Clancy and R. Philip Smith, should have been granted in full.

Mr. Bachman's testimony (R. 123-166) consisted largely of cross examination of the witness by Commission counsel on a report prepared by one White, an employee of the Commission, who interviewed Bachman.

The impropriety of cross examining Bachman upon a report made by White is evident. Cross-examination relates to matters covered in direct examination.

The testimony of Stipe (R. 202-203) was inadmissible since he was asked to testify as an expert although never qualified as such, but shown only to be a drug salesman.

Dr. David's testimony (R. 193-220) should be stricken because it was based on experiments with drugs other

than MD Powder and no proof was offered that the drugs were the same or similar; and for the further reason that he was asked to express his opinion based on his reading of the complaint rather than upon his knowledge of facts.

Dr. Holman's testimony (R. 236-243) was inadmissible because he, too, was asked to state his opinion of matter set forth in the complaint.

Dr. Montgomery's testimony (R. 259-264) was inadmissible because like the other doctors, he was asked and did express his opinion of matter set forth in the complaint, and because he had no authority to speak for other people in connection with the question whether the letters "MD" meant that the product was endorsed by the medical profession.

Dr. Clancy's testimony (R. 291-302) was inadmissible because he also testified on the basis of what he read in the complaint, and not upon his own knowledge, and for the further reason that he was not an expert on reading the minds of other people to determine whether they were deceived by the use of the letters "MD."

Dr. Smith's testimony (R. 303) was indamissible because he, like the other doctors called by the Commission, testified with reference to what appeared in

the complaint, and not from personal knowledge of the facts. He, too, presumed to testify that other people were deceived by the letters "MD," although he was not so deceived.

CONCLUSION

The cease and desist order of the Commission in this case should be set aside to the extent that petitioners may continue to use the letters "MD" in the sale of MD *Medicated Douche Powder*, and the cross and nurse.

Respectfully submitted,

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